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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 673.

THE ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD COMPANY, APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 12, 1876.

Dec 9 1876
Reversed
Jus Bradley

SUPREME COURT OF THE UNITED STATES.

No. 673.

THE ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD COMPANY, APPELLANTS,

VS.

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APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims of the United States, December term, 1874.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD CO.
against
THE UNITED STATES.
No. 10392.

Petition.—Filed May 14, 1875.—J. R.

CHAS. E. PIKE,
Attorney, Washington, D. C.

Court of Claims of the United States, December term, 1874.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD CO.
against
THE UNITED STATES.

Petition.

To the honorable judges of the Court of Claims of the United States, respectfully shows the Atchison, Topeka and Santa Fé Railroad Company, a corporation established under the laws of the State of Kansas, as follows:

Said corporation, as authorized by its charter, has built and owns a line of railroad (for aid in the construction of which it received a grant of lands provided in an act of Congress, approved March 3, 1863, therein made for that purpose, to the State of Kansas aforesaid) extending from Atchison, on the Missouri River, in Kansas, to the western line of said State, upon which it runs regularly, as it has for more than two years, cars for the transportation of passengers and freight.

At the request of the Government of the United States, to wit, of the War Department, this petitioning corporation transported on and over its said railroad, for said Government, between March 31, 1874, and April 1, 1875, freight, for the transportation of which said Government promised to pay the sum of fifty-six thousand one hundred and
2 fifty-nine dollars and sixty-two cents, ($56,159.62,) and passengers, for whose transportation said Government promised to pay the sum of thirteen thousand three hundred and forty-two dollars and thirty-four cents, ($13,342.34,) making in all the sum of sixty-nine thousand five hundred and one dollars and ninety-six cents, ($69,501.96,) which sum for said transportation the Government promised to pay this petitioning corporation as soon as said transportation was performed, and which sum said Government of the United States has not paid to your petitioner, but neglects and refuses so to pay.

The value or price of said transportation, as above stated, was ascertained by deducting from the usual fair and reasonable price or tariff for such transportation of freight and passengers, one-third part thereof, which one-third part has long been agreed by said Government with your petitioner, and with other railroad companies which have received from the Government grants of land upon the same conditions in respect of such transportation as your petitioner, to be, and which in fact is, the share of said expense which should be borne by the capital invested in, or expense of, the construction and maintenance of said road, considered as a highway; the remaining two-third parts being, as above agreed to be, no more than the just share of said expense which is borne by said railroad company, in a manner peculiar to railroad companies in distinction from any and all public highways, as such highways are generally known to the laws and to the public, to wit, such as the expense of maintaining carriages for such freight and passengers, of locomotive power for its transportation, of men to run said trains, and of the loading and unloading of said freight, with sundry other like expenses, none of which are generally borne by public highways.

3 And your petitioner alleges that payment by the Government at the above rate in nowise conflicts with the provision of said act of Congress of March 3, 1863, (sect. 3,) which requires that the railroads for whose construction grants of land are therein made "shall be and remain public highways for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States," but is in just and exact accordance therewith; wherefore this petitioner asks judgment of this court for the above sum of sixty-nine thousand five hundred and one dollars and ninety-six cents, ($69,501.96,) as he is compelled to do under the provisions of the act of Congress entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirteenth, eighteen hundred and seventy-five, and for other purposes," approved June 16, 1874.

Your petitioner corporation further represents that it has never given any aid or comfort to the late rebellion against the Government of the United States, or to any person engaged therein, but has steadfastly adhered to said Government always from the commencement of said rebellion, or from its own first existence as a corporation, to the close of the same rebellion.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY,
By its president, THOS. NICKERSON.

THOMAS NICKERSON, being sworn, says that he is the president of the aforesaid Atchison, Topeka and Santa Fé Railroad Company, and that no assignment or transfer of the claim set up in the foregoing position, or any part thereof, has ever been made by said company to any
4 person, and that said claimant is justly entitled, as above set forth, to the amount so claimed from the United States, after deducting all payments or credits or set-offs to the same, and that the facts stated in said petition are true as he verily believes.

THOS. NICKERSON.

Sworn to and subscribed before me this 3d day of May, A. D. 1875.

WINSLOW WARREN,
Commr. of U. S. Circ. Ct. for Dist. of Mass.

CHAS. E. PIKE, *Washington, D. C.,*
Attorney for the A., T. and S. F. R. R. Co.

5 In the Court of Claims of the United States, December term, A. D. 1874.

ATCHISON, TOPEKA & SANTA FÉ R. R. CO.
vs.
THE UNITED STATES.
} No. 10392.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of sixty-nine thousand five hundred & one dollars & ninety-six cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney-General.

(Indorsed:) No. . *vs.* The United States. General traverse. , assistant attorney-general.

6 In the Court of Claims of the United States, December term, 1875.

Atchison, Topeka & Santa Fé Railroad Company
vs.
The United States.
No. 10392.

And the said defendants, by their Attorney-General, say that the petition is not sufficient in law.

THOMAS SIMONDS,
Assistant Attorney-General.

(Indorsed:) Demurrer. *vs.* The United States. No .

7 The Atchison, Topeka and Santa Fé Railroad Company
vs.
The United States.
10392

At a Court of Claims held at the Capitol, in the city of Washington, on the 17th day of April, 1876, the following entry was ordered to be made:

The demurrer to the petition in this case was overruled.

By the court.

8 In the Court of Claims.

The Atchison, Topeka & Santa Fé Railroad Company
vs.
The United States.
10392.

At a Court of Claims held at the Capitol, in the city of Washington, on the first day of May, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimants' petition be dismissed.

Attest:

Chief Justice.

9 In the Court of Claims of the United States, December term, 1875.

ATCHISON, TOPEKA & S. FÉ R. ROAD
vs.
THE UNITED STATES.
No. 10392.

From the judgment rendered in the above-entitled cause on the first day of May, 1876, in favor of defendants, the claimant, on the 27th day of June, 1876, makes application for and gives notice of an appeal to the Supreme Court of the United States.

By his attorney, CHAS. E. PIKE.

Allowed.

(Indorsed :) 10392. C. of Claims. Atchison, Topeka &c., R. R. vs. The United States. Notice of appeal. Received copy of within notice July 1st, 1876. Thomas Simons, Asst. Atty.-Genl. Filed July 3d, 1876. A. H. Chas. E. Pike, clt's atty.

C. D. DRAKE, *C. J.*

10 Court of Claims.

ATCHISON, TOPEKA & SANTA FÉ R. R. Co.
vs.
THE UNITED STATES.
No.

FINDINGS OFF ACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. Prior to the act making appropriations for the use of the Army, 16th June, 1874, (Stat. Lg.) the War Department employed, to carry freight and passengers, numerous railroads, for whose construction grants of the public lands had been made upon the statutory condition that such roads "shall be and remain public highways for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States."

11 II. Upon careful consideration it was deemed by the Department that a deduction of one-third from the rates at which other railroads agreed to transport public property and troops would be the equivalent of any toll or charge for the use of the road itself, and would be in accordance with the spirit and intent of the law. Upon this basis the work was done by the railroads and paid for by the Department.

III. The claimant, being one of the roads hereinbefore described, at the request of the Quartermaster's Department, transported in its cars and over its roads, and by means of its agents and servants, between the 31st of March, 1874, and the 1st April, 1875, certain military freight and passengers for the use of the defendants. The value of such services at the ordinary tariff rates of the road, being the prices charged ordinarily for like services, and the value at the reduced rate previously established by the War Department are shown by the following statement:

12

For transportation of freight:

At full tariff rates	$83,762 57
With 33⅓ per cent. off for land-grant	$55,377 60

For transportation of passengers:

At full tariff-rates	$19,657 46
With 33⅓ per cent. off for land-grant	$13,312 53

IV. The defendants have not paid the claimant for the foregoing services, nor for any part thereof.

And the judges of the Court of Claims being divided in opinion as to the rights and liabilities of the parties, the court, at the request of the claimant, and for the purposes of an appeal, does pro forma decide as its

CONCLUSION OF LAW.

13 The claimant is not entitled to recover for the transportation of Government freight or passengers over its road, and judgment should be rendered in favor of the defendants.

By the court.

(Indorsed:) 10392. Atchison, T., & S. F. R. R. v. The U. S. Findings. Filed April 22, 1876. J. R.

14 United States Court of Claims.

ATCHINSON, TOPEKA & SANTA FÉ RAILROAD CO.
vs.
THE UNITED STATES.
} No. 10392.

And now, on this 28th day of April, 1876, comes the claimant corporation, and by its attorney, Chas. E. Pike, makes request of the court that it will, in addition to the facts already found, and filed as its ultimate finding of facts, find and certify to the following additional ones shown in the record:

(Allowed.—C. C. N.)

I. That the claimant received lands granted to the State of Kansas by act of Congress of March 3d, 1863.

(Allowed.—C. C. N.)

15 II. That the decision of the War Department that one-third of the rates charged by other railroads for transportation of public property and troops would be the equivalent of any toll or charge for the use of the road itself, and would be in accordance with the spirit and intent of the law, was made as early as August 15, 1861.

(Refused as irrelevant and immaterial.—C. C. N.)

III. That the usage of the Government has been, as it regards the railroad to which grants of public lands have been made, to make settlements with them upon the basis of deducting one-third of the ordinary rates of transportation as equivalent for toll or other charge, since August 15, 1861, and until the passage of the act of Congress of June 16th, 1874.

And that in connection herewith reference may be had to the letters of the Secretary of War to Wm. H. Osborne, dated August 15, 1861, of M. C. Meigs, Quartermaster-General, to Hon. John Sherman, dated Feby. 14, 1865, and of Rufus Ingalls, Acting Quartermaster-General, to the Secretary of War; all forming a part of the record of the case in this court, subject to any objection on the part of the defendant for irrelevancy or otherwise.

CHAS. E. PIKE,
Atto. for Claimant.

(Indorsed:) 10392. C. of Claims. Atch'n, Top. & Santa Fé R. R. vs. The United States. Request for additional finding, (by claimant.) Filed April 28, 1876. J. R. Chas. E. Pike, atto. for claimant.

16 In the Court of Claims of the United States, December term, 1875.

ATCHINSON, TOPEKA AND SANTA FÉ RAILROAD Co.
vs.
THE UNITED STATES.
} No. 10392.

And now comes the Attorney-General, on behalf of the United States, and requests the court to make the following additional finding of facts in the above causes:

(Allowed.—C. C. N.)

That the result of the "careful consideration" mentioned in Finding
II was embodied in a letter from the War Department, dated Aug. 15,
1861, to the president of the Illinois Central R. R. Co., which provided
that Government troops and property were to be carried over
17 certain railroads described, of which the claimant is one, in ac-
cordance with the following terms, viz: The roadway to be used
without compensation; but for motive power, cars, and all other facilities
incident to transportation, reasonable rates, subject to a deduction of
33⅓ per centum in consideration the statuatory condition quoted in Finding
I, to be allowed.

THOMAS SIMONS,
Assistant Attorney-General.

(Indorsed:) No. 10392. Atchinson, Topeka & Santa Fé R. R. Co. vs. The United States. Request for additional finding. Asst. Atty. Genl. Filed April 28, 1876. J. R.

18 In the Court of Claims.

THE ATCHISON, TOPEKA AND SANTA FÉ RAILroad Company
vs.
THE UNITED STATES.
} No. 10392.

I, Archibald Hopkins, clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon, of the application of the claimant for the allowance of an appeal, as filed in the clerk's office July 3d, 1876, and of the order of the Chief-Justice allowing the same, of the *of the* order of the court overruling the demurrer filed herein, of the finding of facts & conclusions of law filed by the court, and of the requests of the claimant & defendants respectively for additional findings of fact, with the rulings of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 29th day of July, 1876.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 673. The Atchison, Topeka & Santa Fé Railroad Company, appellants, vs. The United States. Court of Claims. Filed 12th August, 1876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

No. 673.

ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD CO.,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

BRIEF FOR THE APPELLANT.

THOMAS H. TALBOT, BOSTON, MASS.,
Of Counsel for the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

No. 673.

ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD CO.,

APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

BRIEF FOR THE APPELLANT.

THE Atchison, Topeka, and Santa Fé Railroad Company, a corporation established under the laws of Kansas, owns and operates a railroad extending in a south-westerly direction from the eastern to the western border of that State.

Within the time stated in its petition, it performed for the United States, at the request of the War Department, over its road, in its own cars, by means of its own locomotives, and by aid of its own servants, transportation of property and troops, which amounted, at rates previously agreed to by such department, to $68,690.13, which sum that department would have voluntarily paid, except for a prohibition of law, which arose as follows: —

To aid in the construction of its road, this company had received, through the State of Kansas, from the United States, a grant of lands. This grant, made by an act of March 3, 1863, was upon the following condition, to be found in the third section of that act: —

> "And the said railroads and branches shall be and remain public highways for the use of the government of the United States, free from all toll or other charge, upon the transportation of any property or troops of the United States." — Stat. at L., XII. 773, Ch. XCVIII., Sec. 3.

Of the phraseology of this condition, which is common to many of the statutes making grants of land for the purpose of aiding in the building of railroads, a certain construction had been adopted, by agreement of the government and such railroad companies, from the first employment of such companies to perform transportation for the government.

By this construction, the above condition was held to apply to railroads only so far as they were similar to public highways, to take effect only upon so much of a railroad as is common to railroads and highways. It was held not to impose any burden upon a railroad company, considered merely as engaged in the business of transportation.

Thus was established a basis, upon which a division could be made of the whole expense of railroad transportation. Two-thirds of such expense were allowed, in accordance with actual experience, to the active operation of the road, and one-third to the road itself; two-thirds to the expenses incurred by the transportation company, and one-third to the permanent public highway.

Upon this basis the business was performed, by other like companies and by the appellant, and paid for, until the 16th day of June, 1874, when the law-making power forbade any further payments upon this basis, for transportation by railroad companies which had received land-grants upon the foregoing condition.

This prohibition is to be found in a proviso attached to a bill making appropriations for the support of the army, and is as follows: —

> "That no part of the money appropriated by this act shall be paid to any railroad company, for the transportation of any property or troops of the United States over any railroad,

which, in whole or in part, was constructed by the aid of a grant of public land, on the condition that such railroad should be 'a public highway for the use of the government of the United States, free from toll or other charge,' or upon any other conditions for the use of such road for such transportation; nor shall any allowance be made out of any money appropriated by this act for the transportation of officers of the army over any such road, when on duty and under orders as a military officer of the United States. But nothing herein contained shall be construed as preventing any such railroad from bringing a suit in the Court of Claims, and recovering for the same, if found entitled thereto by virtue of the laws in force prior to the passage of this act." — Stat. at L., XVIII. 74; re-enacted and made perpetual, March 3, 1875, Ib. 452.

It will be seen, that, from its prohibitions, this enactment expressly excepts the right of bringing a suit in the Court of Claims, and by appeal in this court, "for the charges for such transportation, and recovering for the same, if found entitled thereto by virtue of the laws in force prior to the passage of this act."

It is, then, by force of laws prior to that of June 16, 1874, that this case is to be determined. In fact, the defence to the appellant's claim rests upon the third section of the statute of March 3, 1863, which has already been quoted.

That section secures to the government, "free from all toll or other charge," the use of something, of a railroad, as "a public highway."

FIRST.

Then let the first question considered be, What would this language mean at common law?

I. How is the expression, "use of a railroad," understood under the common law?

The use of a railroad might be transferred by a common-law instrument, a lease, or, still better, by deed. That is, it would be most firmly and completely carried by a deed of the railroad itself.

A. What would such a deed be held to convey? Nothing but the road itself; the real estate, nothing more.

Such a deed would not even carry the rolling stock. See Bement *vs.* Plattsburgh & Montreal R.R., 47 Barb., 104; Beardsley *vs.* Ontario Bank, 31 Barb., 624.

See, also, the view taken by this court in the case of the Minnesota Co. *vs.* St. Paul Co., 2 Wall., 609. There the contending mortgages, each, in terms, conveyed the rolling stock; and the question now discussed could not arise. Both opinions, however, use expressions which imply, that, aside from the connection created by the mortgage, the road and its rolling stock are not connected. Mr. Justice Nelson (p. 644) speaks of the rolling stock as made a fixture by the mortgage, "so far as in its *nature and use it can be called a fixture;*" and Mr. Justice Miller mentions "the road and rolling stock" as though they were not one, but two.

B. If the most effective conveyance of the use of a railroad known to the common law would not carry even the rolling stock, unless this rolling stock were expressly mentioned therein as to be conveyed, it must be true, on still stronger grounds, that it would not carry any thing more remote from the idea, the substance, of a mere road, than is such rolling stock.

More distant than such rolling stock, certainly, are elements which the defence claims to be conveyed to them, by force of the phrase, "use of a railroad." Those are the constant furnishing of cars, of locomotive power, of service, and of direction essential to the operation of a road.

These, instead of being carried by implication in a deed of a railroad, would scarcely be deemed proper subjects to be inserted in such an instrument. They would more fitly form parts of an agreement not sounding of the realty, a mere personal contract to furnish these elements of personal service.

Thus, it clearly appears that the government is, in this suit, demanding something which it would not have received, had the road upon its completion been transferred to it by absolute deed.

II. But under this third section the government is not entitled to an unrestricted use of this railroad. It is to use it as a public highway is used, not otherwise.

Now it is clear that a public highway is not furnished, and is not expected to furnish, rolling stock, locomotive power, or skilled operatives to aid the transportation along its line. It furnishes simply a roadway.

III. If it be thus of the phrase "public highway," how is it with the other adjunctive word, the word "toll"?

"Toll" is not known as the price of transportation. Neither Bouvier nor Webster so understands its use, the latter of whom defines "toll" as a tax paid, "particularly for travelling over a road, bridge, &c."

The earnings of transportation companies are in fares and freights, not tolls.

In England, this word is found to have, as apparently it has not in this country, a meaning in connection with railroads. But this English meaning is not one which would suit the purpose of this defence. It is, on the other hand, one which supports the position of the appellant; namely, something paid by one railroad company for the liberty of passing its carriages over the road of another company.—Simpson *vs.* Denison, 13 Eng. Law and Equity, 359.

Thus, it appears, that, as the common law knows these expressions, "use of a railroad," "public highway," and "toll," neither has a meaning which will support the claim of the government. Neither implies the duty of active transportation; each is satisfied with such use of a railroad as one railroad company may make of the road of another company, the mere license to pass with its own cars and engines over such road.

N. B. The words "or other charge," following the word "toll," are to be understood in the sense of "other like charge;" that is, like to toll.

This, upon the well understood principal of *Noscitur a sociis.* See Broome's Legal Maxims, p. 523, and these cases there cited: Borradaile *vs.* Hunter, 5 M. & Gr. 639 (See 667); Hunt *vs.* Robins, 2 G. & D. 646; Hardy *vs.* Singer, 5 Exch. 294 (See 298).

SECOND.

The second portion of this argument will maintain that the phraseology now under consideration has been used in the statutes of the United States in the same sense as has herein been assigned to it at common law.

IV. First, let it be noticed that the statutes of the United States understand what constitutes a completed railroad as does the New York decision already cited.

When Congress requires, as a condition to its grant of aid, that a railroad shall be equipped, it specifies equipment; while it is otherwise in its grant of aid to the road of the appellant.

Compare act of March 3, 1863, Sec. 4, Stat. at L., XII. 772, with act of July 1, 1862, Sec. 3, Stat. at L., XII. 492.

V. Here the point is pressed upon the attention of the court, that the government, in each of these statutes, required to be built, to be completed, precisely what they intended to use; and in one case they demanded a road completely equipped; and in the other case, that of this appellant, they demanded only a roadway.

VI. Next, to the phraseology now in question.

The expression "shall be and remain a public highway" is quite ancient in the statutes of the United States. See statute of June 1, 1796, where it is applied to navigable rivers. — Stat. at L., I. 491.

May 6, 1824, it is used with reference to a canal. — Stat. at L., IV. 47.

In 1827 (March 3), it is applied to a turnpike. — Stat. at L., IV. 242.

June 30, 1834, it is used in connection with a military road. — Stat. at L., IV. 716.

August 8, 1846, Congress used this expression twice, and in each case with reference to a river to be made navigable. — Stat. at L., IX. 78, 83.

In none of these instances will it be contended that this phrase, in either of its slightly varying forms, imposes upon the grantee of lands conveyed by the respective statute any burden of active transportation. In each case the phrase would be amply satisfied by mere passive allowance, by the mere liberty of passing over the road, or river, as the case might be.

VII. From these last-cited statutes this phraseology passed into the statutes of the United States, which make grants of lands to aid in the construction of railroads. See grant in aid of Illinois Central R.R. Co., Sept. 20, 1850. Stat. at L., IX. 466.

To that time it had, in the laws of the United States, never been understood as imposing the duty of active transportation. Its full force had been contented with the mere liberty of passage. What now was the construction given to this phraseology in its new connection?

VIII. Of course, as soon as any railroad, built with the aid of lands granted under this condition, was called upon to transport troops or property of the United States, there would arise occasion for the interpretation, first by the executive departments, of this language. Such interpretation the case finds as early as August, 1861; it finds no other earlier. This, then, may be deemed to have been adopted from the outset.

This was a construction which confined the exemption of the United States to a free use of the mere roadway; which required, on behalf of the government, only a deduction of one-third of the usual price of transportation.

It is a construction of earlier date than the statute which granted the lands now held by the appellant, and may fairly be held to be a part of the grant.

Peabody *vs.* Stark, 16 Wallace, 240.
Clark *vs.* Peaslee, 1 Clifford, 545 (See p. 563).
Packard *vs.* Richardson, 17 Mass. 122 (See p. 144).
Rutland *vs.* Mendon, 1 Pick., 158.
Commonwealth *vs.* Hartnett, 3 Gray, 450.

IX. But, beside this construction by the executive department, there was construction also by the law-making power, before the date of the grant under which the appellant has taken lands.

See the "Joint Resolution in relation to certain Railroads in the State of Missouri," of March 6, 1862. Stat. at L., XII. 614.

Under this resolution two railroads in Missouri, for reasons given, were relieved by Congress. The measure of this relief was compensation for transportation of the property and troops of the United States, "not exceeding the prices fixed by the War Department" "for transportation by railroads." Such compensation might rise to full price.

C. First to be noticed is the recital of the preamble, that the ability of these "railroad companies to transport the property and troops of the United States over their railroads has been greatly impaired."

Now, as the debate shows that this impaired ability was wholly pecuniary, a mere inability to procure the money necessary to pay for repairs already made (of injuries done by the enemy), and for the current expenses of the roads, it is worth while, in the course of this argument, to inquire on what pecuniary terms these railroad companies had previously endeavored to perform such transportation.

Had they broken down in an attempt to transport troops and property of the United States, absolutely without charge to the United States, entirely at their own cost and expense? Not at all.

They had merely endeavored to transport for the government for two-thirds their regular price; and their ability, thus recognized as impaired, was an inability to endure a deduction of one-third of such regular price.

Special attention, however, is called to the conditions under which this relief was granted.

D. The relief granted by this resolution was to preclude all further claim "for compensation," as though, aside from this provision, these railroad companies might have such claim.

E. Then, too, the ultimate right, carefully reserved by the government, was the right to take possession of the roads; the government of course, in that case, operating them at its own expense.

Thus, it appears, the ultimate right of the United States there stated by Congress did not include what the government h[illegible]rts to be its right, the right to have these roads [illegible]ely operated for its use, free of all expense to itself.

X. The statute granting aid to the great railroads which were to cross the continent, was passed near this same time. See act of July 1, 1862, Stat. at L., XII. 489.

From these railroad companies the government intended to exact the performance of active transportation; and here is the language with which that intention was expressed.

> "The grants aforesaid are made upon condition that said company . . . shall keep said railroad . . . line in repair and use, and shall at all times . . . transport mails, troops, and munitions of war, supplies and public stores upon said railroad, for the government, whenever required to do so, by any department thereof." (Sect. 6, p. 493.)

This phraseology is not that which is now at bar, in form or substance.

XI. But it appears in the same section, that, for such transportation over these trans-continental railroads, the government was to pay full compensation.

True, the sums thus paid were to be appropriated on a special account, in reimbursement to the government.

But it was not to reimburse for lands granted: the transportation money was not to be carried to the land-account. It was to be appropriated to the payment of the bonds of the

United States, which had been issued to aid in the construction of the roads. These bonds wholly paid, it would seem that the government was thereafter to pay absolutely for its transportation, as any private individual.

It thus becomes manifest, that the grant of lands was made to the Pacific railroads, not on account of transportation to be performed for the United States. In fact, the grant was, for the purpose of this discussion, a pure gratuity.

XII. Shortly after the passage of this act of March 3, 1863, Congress gave an interpretation to the phraseology now in question, by adding "to all the provisions, restrictions, limitations, and conditions" of this act, as though the addition were necessary, the following: —

> "Provided, that said railroad" (not that of the appellant) "shall be a public highway, and shall transport troops and munitions of war of the United States, free of charge." See Act of July 1, 1864, Stat. at L., XIII. 339, Ch. CXCVIII. Sec. 1.

XIII. Later, the construction given from the outset by the War Department to this phraseology, as used in connection with railroads, was formally communicated by the Q. M. G. to a committee of Congress. See letter of Feb. 14, 1865, herewith.

Thereafter Congress proceeded, in several instances, by way of enlargement, or of extension of the time of limitation, of former grants, to re-enact this same phraseology. See the following: —

March 3, 1865,	Stat. at L.,	XIII.	521,	Chap.	CIII., Sect. 1.
“ “	“	“	527,	“	CV. Sect. 5.
“ “	“	“	530,	“	CVIII., Sect. 1.
April 10, 1869,	“	XVI.	46,	“	XXIV., Sect. 1.
March 3, 1871,	“	“	580,	“	CXXIII., Sect. 1.
“ “	“	“	582,	“	CXXVIII., Sect. 1.
“ “	“	“	587,	“	CXL.

XIV. But for the most part, in making new grants, it adopted new language; as for instance the following, by way of addition to the phraseology under discussion: —

“And the same shall be transported over said road, at the cost, charge, and expense of the corporation or company owning or operating the same, when required by the United States so to do.”

See Act of July 13, ’66, Stat. at L., XIV. 95, Ch. CLXXXII., Sect. 4.
“ “ 25, “ “ “ 237, “ CCXLI., “ 3.
“ “ “ “ “ “ 241, “ CCXLII., “ 5.
“ “ 28, “ “ “ 338, “ CCC., “ 1.

Or the following as the full condition of the grant: —

“That said company, after the construction of the road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road, for the government of the United States, free from all cost or charge therefor to the government.”

See Act of July 26, ’66, Stat. at L., XIV. 290, Ch. CCLXX., Sect. 3.
“ “ March 2, ’67, “ “ 549, “CLXXXIX., “ 8.

XV. This language, let it be observed before turning away from it, secures a right which might be enforced by judicial process; one which could not be enforced by taking possession of the road, the manner in which Congress, in the joint resolution of 1862, proposed to enforce the right which it had under phraseology like that now at bar.

Plainly this difference in remedies rests upon an essential difference in rights.

XVI. There remains but a single question to be considered in connection with the legislation of the United States upon this subject. That is, what, in these later years, when other language than the phraseology at bar has been used in making grants of lands to aid in the construction of railroads, what has become of the old expression, the phraseology at bar?

The answer is: it is still used in making grants to aid the construction of ordinary roads; still used, where it is, and from necessity must be, entirely unconnected with the idea of active transportation to be performed by a grantee, —

where it can express only the liberty of passing. See acts making grants to military waggon-roads, Feb. 25, 1867, Stat. at L., Vol. XIV. 409, Ch. LXXVII., Sect. 2; March 3, 1869, Vol. XV. 341, Ch. CL., Sect. 2.

THIRD.

In the case of Peabody *vs.* Stark, before cited (16 Wall. 240), this court was influenced towards the adoption of a rule previously allowed and followed by an executive department, by the fairness of the rule itself.

It cannot then be inappropriate to notice the character of the rule, which the appellant in this case would maintain, in this regard. Is it a fair rule, as between the government and the land-grant railroads?

XVII. The former, the government of the United States, is in two ways interested in this matter.

1. As a great landed proprietor; as owning lands through which the proposed railroads are to run.

And it appeared, as early as 1862, that in this capacity the government had received full compensation for its grants in aid of such roads. The Judiciary Committee of the House of Representatives then reported that the price of lands remaining in the ownership of the United States (that is, an equal moiety of the original whole), along the line of such roads, had already doubled. Cong. Globe, Part I. 2d Sept. 37th Cong. 1861–2, p. 605. "In every instance," is the statement.

2d. As a sovereign; and here in two respects.

E. In the increase of the population of the United States, as tending to the greatness and happiness of the nation. Such increase as consequent upon the building of railroads is witnessed by the sudden enhancement of the price of public lands, just mentioned.

F. In the importance of means of swift transportation to all the operations of the government in the far West, and also to the operations of war. It is much to reduce the time of passage from Chicago to San Francisco to six days, and to shorten all intermediate distances in the same ratio.

G. Besides these considerations, there is not to be overlooked the great saving of expense by the substitution of railway transportation in place of those modes used in the absence of railways: a reduction nearly from four to one, which a further deduction of one-third makes a total reduction from six to one, a saving of five-sixths.

XVIII. And (a fact showing the effect of this rule upon the other party, the railroad companies) these railroads could not have been built without the aid, and very liberal aid too, from the government.

The statutes of the United States support this assertion. They exhibit not a few instances of the extension of the time within which grants of lands in aid of proposed railroads could be made effectual by the building of such railroads.

Capital, it may safely be inferred, was not eager for investment in such enterprises. This, of the earlier time near that of these grants, the contemporaneous condition, which must be considered in their interpretation.

The present time ought to appear more favorable to such enterprises; but even now, the building and operating of even land-grant railroads is not universally, or even generally, a profitable investment of capital.

Ultimately, it is true, some of these undertakings may be very remunerative; but capitalists in this country are not willing to wait long for returns.

XIX. Without the allowance to these railroad companies of a compensation of two-thirds their regular price, for transportation performed for the government, these roads could not have been operated by their owners during the late war. See the letter of the Q. M. G., printed herewith. And that officer feared, as the greater evil than the paying of this rate of compensation, the abandonment of these roads to the government itself.

XX. Allusion has already been made to the fact, that in the case of the great Pacific roads, the government made its grant of lands without stipulating for any privilege of gratuitous transportation in whole or in part, upon no condition, save that the road should be well built and well operated.

This liberality, by the same Congress which granted the lands now held by this appellant, must have been deemed by that body necessary to secure the building of those great roads; and their building must have been considered as well worth to the government what the government bestowed upon their construction; not lands only, but credits, credits that could be turned into money; a munificent donation of lands and bonds of the United States.

Here this brief closes, having maintained these propositions: —

First, The language of the instrument which binds the petitioner, that is, of the third section of the act of March 3, 1863, AS UNDERSTOOD AT COMMON LAW, does not support the logic of this defence. It upholds the claim of the petitioner.

Second, ONLY IN THIS SENSE has it ever been used in the statutes of the United States. Congress so used it at the first. The Executive Department so interpreted and administered it. Congress subsequently sanctioned and confirmed this interpretation. This interpretation was fixed and established when the grant of the lands now held by the petitioner was made, and thus became a part of the grant. The subsequent legislation of Congress has re-confirmed this interpretation.

Third, As between the parties concerned, the rule contended for by the appellant is essentially fair and just. Its adoption leads to the accomplishment of the purposes which the government sought to accomplish by the legislation in question, and is necessary thereto. It secures to the railroad companies nothing which circumstances do not make it just and equitable for them to demand.

All which is most respectfully submitted for the consideration of the Court.

THOMAS H. TALBOT,
Of Counsel for the Appellant.

War Department,
Quartermaster-General's Office,
Washington, D.C., Feb. 14, 1865.

Hon. John Sherman, *Chairman Finance Committee, United States Senate :* —

Sir, — There are no special contracts between this Department and the land-grant railroads.

The rule of the Department in settling the claims of such roads for the transportation of troops and stores is given in the enclosed copy of a letter from the Secretary of War to Hon. H. Osborne, 15 August, 1861.

There has been much difficulty in ascertaining what railroads are land-grant roads. Inquiry addressed to the Attorney-General and to the General Land-Office having failed to procure the desired information, I addressed letters to the secretaries of state of the several States, and succeeded in obtaining the information embodied in a letter of instructions from this office to Capt. Raymond Burr, A. Q. M. Vols., dated June 3, 1864, of which I enclose a copy.

The public-service clauses in the laws granting land to States to aid in construction of railroads provide, generally, that the railroads shall remain public highways for the use of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

And, further, that the mails of the United States shall "be at all times transported, under the direction of the Post-Office Department, at such price as the Congress may by law direct," or as, in absence of legislation, the Postmaster-General may fix. (See Laws U. S., 1850, ch. 61, §§ 4 & 6; 1856, chs. 31, 41, 42, 44, 83; 1857, ch. 99, §§ 3 & 5.)

The grants of land made in aid of canals appear to have been in some cases subsequently modified, to allow the lands to be used in aid of construction of railroads.

The grant for a canal requires that the canal "shall be, and forever remain, a public highway for the use of the Government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through the same." (See 1822, ch. 61, § 1; 1827, ch. 51, § 1.) The words used are identical in their meaning with those used in the public-service clause of the railroad land-grants.

It has appeared to me, that as the law would not require a canal company or a turnpike company, under a clause providing that the canal or turnpike road should be a public highway free of toll or charge for transportation of property or troops of the United States, to hire and move by horse-power over the canal, boats, or over the turnpike, stage-coaches and wagons, for the transportation of United States troops and property, so the similar conditions of the grants to States in aid of railroads constructed by companies could not be fairly interpreted as intending that these companies should provide and move the railroad engines and cars for the transportation of such public property and troops.

The railroad remains a highway, free for the United States, which, if it finds it economical or necessary, may put its own engines and cars thereon, and transport its troops and property without paying the company for the use of the railroad, just as it may put its own boats upon a canal, or wagons upon a turnpike, and move them free of toll, in a similar case.

I need hardly add that it is not for the interest of the United States to supply its own rolling-stock to do its work upon these land-grant railroads, and that it is much more economical to hire the engines, cars, and well-drilled operatives of the company, by paying for the service a certain fixed rate for each man or ton transported by the company.

Upon careful consideration it was considered that a deduction of one-third from the rates at which other railroads agreed to transport public property and troops would be the equivalent of any toll or charge for the use of the road itself, and would be in accordance with the spirit and intent of the law. Upon this basis the work has been done.

As regards the policy of requiring the roads to do this work without any compensation, it is not perhaps proper to make suggestions. I hope, however, that Congress will not legislate in such a manner as to compel any of these railroads to abandon their roads, and throw them into the hands of the Government.

This Department finds the management of the railroads within recovered rebel territory, which it is obliged to take possession of, and to repair and stock, a very heavy though unavoidable burden.

I enclose a copy of a general resolution of Congress under which settlements have been made with certain land-grant roads in Missouri, and also copies of the printed instructions of this Office relating to the rates to be paid railroads generally.

Hoping I have answered the question of the honorable the Committee of Finance fully and satisfactorily,

I remain, very respectfully, your obedient servant,

(Signed) M. C. MEIGS,
Quartermaster-General, Brevet-Major-General.

WAR DEPARTMENT, Aug. 15, 1861.

W. H. OSBORNE, ESQ., *President Illinois Central R.R. Co.*

SIR, — Upon consultation with the Quartermaster-General, it has been decided by this Department that the clause in your charter, Section 4, gives a clear right to the Government of the United States to the use of your roadway, without compensation, for the transportation of its troops and its property. As a proper compensation for motive power, cars, and all other facilities incident to transportation, two (2) cents per mile will be allowed for passenger travel, subject to a discount of 33⅓ per cent as due to Government for charter privileges.

Payment for transportation of freights, stores, munitions of war, and other public property, will be made at such reasonable rates as may be allowed railroad companies, subject, however, to the abatement of 33⅓ per cent, as before specified.

The foregoing basis has been arranged with the distinct understanding that transportation shall be furnished by your company at such times and in such manner as the Government of the United States may require, and that preference shall be given to Government transportation, in accordance with the requisitions of this Department and of its officers.

If this proposition is acceptable to your company, notice in writing to that effect will be expected within ten days from this date.

Very respectfully, your obedient servant,
(Signed) SIMON CAMERON,
Secretary of War.

True copies:
HENRY HODGES, *Quartermaster U. S. Army.*
Q. M. G. O., Dec. 21, 1875.

Executive Documents, 2d Sess., 38th Congress, Vol. 8, No. 39.

WAR DEPARTMENT,
WASHINGTON CITY, Jan. 27, 1865.

SIR, — In answer to the resolution of the House of Representatives of the 16th inst., inquiring whether or not any payments have been made to the Illinois Central Railroad since the passage of the House resolution of the last session of Congress; and, if so, how much, and by what authority, — I have the honor to state, first, that payments have been made to the Illinois Central Railroad since the passage of the resolution referred to; second, that said payments, as reported by the Quartermaster-General, amount to the sum of $552,597.40; third, that they have been made by authority of the President of the United States.

Very respectfully, your obedient servant,
EDWIN M. STANTON, *Secretary of War.*

HON. SCHUYLER COLFAX,
Speaker of the House of Representatives.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 673.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 673.

BRIEF FOR THE UNITED STATES.

The case is that by the act of 1863, ch. 98, the United States granted to the State of Kansas, for the purpose of aiding in the construction of *a railroad from the city of Atchison, via Topeka, to the western line of the State*, (being the railroad of the appellant,) "every alternate section of land designated by odd numbers, for ten sections in width, on each side of said road," with a provision (sec. 3) "that the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

It appears that in August, 1861, the War Department had determined to construe land-grant acts containing provisions similar to that last given above as meaning only that the tract should be free from toll, leaving the companies to charge the United States for the use of rolling-stock, &c., and thereupon had apportioned the rates of fare and freight usually charged by railroad companies, so as to allow to the United States, on account of the above reservation, a deduction of one-third part from such rates. Settlements accordingly were made with roads upon that footing until 1874, when Congress (June 16, 1874) provided that "no part of the money appropriated by this act [1874, ch. 285, making appropriations for the support of the Army for the year ending June 30, 1875, &c.] shall be paid to any railroad company for the transportation of any property or troops of the United States over any road which in whole or in part was constructed by the aid of a grant of public land on the condition that such railroad should be a public highway," &c., as above; reserving, however, to such companies the power of testing their rights to such money by suit in the Court of Claims.

In accordance therewith, this suit has been brought for $69,501.96 for transportation, &c., between March 31, 1874, and April 1, 1875.

On behalf of the United States, it is submitted that by the above provision of section 3 of the act of 1863, ch. 98, Congress has reserved to the United States freedom from charges of any sort on account of transportation, &c., by the plaintiffs over their road. The question is one of interpretation, viz: Did Congress mean (1) by the word "railroads" *railroads equipped*, and (2) by the words "toll or other charge upon the transportation," &c., *fare* and *freight?*

I submit that they did. The first question is *not*, granting that by *railroads* only *tracks* were intended, Are cars, &c., *fixtures* to such tracks, and therefore necessarily included in whatever term designates them; but whether, by *railroad*, Congress, in the present instance, did not intend to include more than the mere track?

Railroad is a word of ambiguous signification. By a proper context it might be seen that the *company* itself was intended, or that only the *track* was intended; but commonly, as is submitted, it means *track and equipment.*

For instance, in the act of 1863, before the court, the words, (1st section, 2d line, &c.,) "for the purpose of aiding in the *construction of a railroad*," and (1st section, 2d proviso) "*the lands hereby granted shall be exclusively applied in the construction of said roads*," did not hinder such lands from being applied to purchase equipments for the roads.

It is also submitted that in providing that the railroad should remain a *highway*, the act did not sever the track from the equipments, but intended that *in the respect in which the road was to the public a means of transit for pay, in that it should be to the United States a means of free transit; that to the same extent that the public have a right to demand transportation from the company at a price, the United States have a right to demand it for nothing.* Ordinary roads are highways for foot-passengers, horses, and carriages; a railroad can be a way at all only by being equipped, (no matter by whom,) and therefore is then only a *highway.* It follows that the plaintiffs agreed that when equipped (no matter by whom) it should be a highway to the United States *free*, &c.

(2) The word *toll* in connection with railroads is also ambiguous, but is largely used in statutes and in opinions of courts (frequently in connection with *charge* or

transportation) to include fare and freight. (Vermont R. R. Co. *v.* Fitchburg R. R. Co., 9 Cushing, 369; State *v.* Northern Central R. R. Co., 18 Md., 193; Philadelphia R. R. Co. *v.* Catawissa R. R. Co., 20; Camden R. R. Co. *v.* Briggs, 2d Zabriskie, 620; Beekman *v.* Saratoga R. R. Co., 3 Paige, 45; Raleigh R. R. Co. *v.* Davis, 2 Dev. & Brt., 451; Blake *v.* R. R. Co., 19 Minn., 418; Hursh *v.* Northern Central R. R. Co., 74 Pa., 181.)

In some of the above cases, *toll* appears in connection with *transportation*, but there is no suggestion in them, as in the brief of the learned counsel for the appellant, that the latter word is to receive color from the former. If it be granted that by itself *toll* refers to the use of the track, it seems that by adding *charge* Congress intended to provide for another contingency. The cases cited by the learned counsel to support the suggestion made by him are cases in which it appeared plain by the *general object of the act* that certain words of larger signification were to be restrained to the narrower sense of the words preceding them in the same connection.

At all events, considering the usual method of transportation upon railroads, the expression *toll or charge* will be allowed an application, not *identical* with, but *analogous* to, its application to canals, turnpikes, and rivers, the usual method of transportation upon which differs so greatly as regards the common ownership of the *way* and the *vehicle.*

(3) The court cannot be embarrassed by the ingenious construction placed upon this provision by the War Department, under the pressure of *hard cases*, during the rebellion, especially since that construction has been questioned by Congress. (U. S. *vs.* Dickson, 15 Peters, 141; U. S. *vs.* Gillmore, 8 Wall., 330; Dollar Savings-

Bank *vs.* U. S., 19 Wall., 227; Goldsboro *vs.* U. S., Taney, 80.)

(4) The *amount of the grant by Congress* suggests an *entire* immunity to the United States from fare and freight. Over considerable periods of time the interest upon the proceeds of 6,400 acres to the mile of line must greatly exceed the fare and freight annually receivable from the United States. In the mean time, the company has been paid long in advance of the service, and at a critical period in its affairs. By comparing the amounts of land granted to canals, rivers, and turnpikes (Statutes at Large, iv, 47, 242; ix, 78 and 83) with those given to railroads, (Stats., xi,) (see index for a large number,) and since, it will be seen that Congress has had respect to the difference in advantages to be obtained by the public from freedom from toll or charge upon the one and the other class of beneficiaries.

(5) It is also submitted that the service in transporting the mails, the pay for which Congress has reserved, by section 5 of the same act, the right to regulate, is the same in extent with that which by section 3 was to be gratuitous.

S. F. Phillips

Sol. Genl.

SUPREME COURT OF THE UNITED STATES.

October Term, 1876.

No. 673.

ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD CO.,
Appellant,

vs.

THE UNITED STATES, Appellee.

OPENING ARGUMENT FOR THE APPELLANT.

THOMAS H. TALBOT, Boston, Mass.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1876.

No. 673.

ATCHISON, TOPEKA, AND SANTA FÉ RAILROAD CO,

APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

OPENING ARGUMENT FOR THE APPELLANT.

STATEMENT OF THE CASE.

THIS appellant is a corporation created under the laws of Kansas, and owning a railroad extending from Atchison near the north-eastern border of the State, south-westerly, to its western line on the upper waters of the River Arkansas, — a main line of about 470 miles, exclusive of branches. Extending, as this road does, from the lower part of the Missouri River, far into the farther West, it became as soon as constructed an important means of transportation for property and troops of the United States; and during the year covered by the petition in this case, namely, ending March 31, 1875, this transportation, at regular rates, would have amounted to more than $100,000.

But compensation at the regular rates of fare and freight, the appellant has never received, nor even claimed, from the United States. It has uniformly deemed the United States as entitled to some exemption, some considerable deduction from full rates of fare and freight; and, such deduction being made, the transportation performed for the Government, set forth in this petition, amounts to the sum of $68,690.13, as found by the Court of Claims.

The relations of the two parties leading to this deduction, and in fact ultimately resulting in the present suit, are as follows: —

To aid in the construction of this road, the appellant corporation has, in due course of law, acquired lands, previously public lands of the United States, which were for that purpose granted to the State of Kansas by an Act of Congress of March 3, 1863. (Stat. at Large, XII. 772.) By the third section of this statute it is provided, —

> "That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States."

This appellant corporation, when it first began to perform the duties of a transportation company, found in operation a certain interpretation of this condition, annexed as before stated to its grant of lands, which interpretation had obtained in this way: —

In the actual operation of railroads in this country, it had been found, that, in general, the expenses of operating absorbed about, I may safely say, at least two-thirds of their gross income. In general, a railroad would be classed as both well managed and prosperous, which could lay aside as interest on its permanent investment, on its capital invested in so much of its road as might be deemed real estate, one-third of its gross earnings.

This general fact the interpretation, of which I have spoken, considered, recognized, and accepted, as a basis upon which it would rest.

The permanent structure, the road-bed, with its bridges, its culverts, its rails, its turn-outs, its sidings, its depot grounds, its depot buildings, its terminal grounds; in short, all the real estate which naturally and necessarily forms part and parcel of a well-constructed railroad, — all this was deemed, under the statute provision before cited, to be part and parcel of such railroad considered as "a public highway," and as such to be open to the use of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

And the cost of all this had been found, in actual experience as before stated, to be fairly represented by an annual sum scarcely equalling one-third of the average gross income of railroads.

The other two third parts of such income were found to be pretty constantly absorbed in the payment of expenses of a different character; that is, what are called the current expenses of operating the railroads. These are incurred in the maintaining of cars; in the maintaining and operating of locomotives; in the loading, unloading, and storing of freight; in the service required in the running of trains, and the direction necessary to the proper operation of a railroad. These expenses were deemed not to belong to public highways, — to be unknown to them. As such, the statute provision before cited did not refer to them. They were left outside of its exempting provisions, to be borne by the United States, whenever they were incurred in the transportation of its property or troops.

The before-recited condition found in statutes of the United States, making grants of lands in aid of railroads, being thus interpreted, a deduction of one-third of the regular price for transportation was deemed to be a fair and full equivalent for the right reserved to the Government thereby. Of course, then, the other two-thirds of such price, the Government should pay for transportation of its property or troops by railroad companies which had received lands granted under this condition. And at this rate the Government did pay from the beginning of transportation by what are called land-grant railroads, to the 16th of June, 1874.

On this last-named day was approved an act making appropriations for the support of the army, which act contained the following provision:—

> "That no part of the money appropriated by this act shall be paid to any railroad company for the transportation of any property or troops of the United States, over any railroad which, in whole or in part, was constructed by the aid of a grant of public land, on the condition that such railroad should be 'a public highway for the use of the Government of the United States, free from toll or other charge,' or upon any other conditions for the use of such road for such transportation; nor shall any allowance be made out of any money appropriated by this act, for the transportation of officers of the army, over any such road, when on duty and under orders as a military officer of the United States. But nothing herein contained shall be construed as preventing any such railroad from bringing a suit in the Court of Claims, for the charges for such transportation, and recovering for the same if found entitled thereto by virtue of the laws in force prior to the passage of this act." (Stat. at L., XVIII. 74; again enacted and made perpetual March 3, 1875, Ib. 452.)

Here, it will be seen, is an express prohibition of any further voluntary payment, by any executive department of the government, to the appellant corporation, or any other land-grant railroad company, for transportation of troops or property of the United States.

But the act expressly excepts the right of bringing a suit in the Court of Claims (with right of appeal to this court: Act of March 3, 1863, ch. xcii. sect. 5. Stat. at L., XII. 766) "for the charges for such transportation, and recovering for the same if found entitled thereto, *by virtue of the laws in force prior to the passage of this act.*'

The case, therefore, may be deemed one which Congress of its own motion, without, and even against, the wish of the petitioner, has referred to this honorable tribunal. By the unsolicited invitation of the law making power, the petitioner appears here.

ARGUMENT.

The appellant is compelled in here to assert its rights under laws in force prior to June 16, 1874.

Of those prior laws, it is that of March 3, 1863, — its third section, already quoted, — upon which this case is to be decided.

This section, it is maintained in the defence, imposes upon the plaintiff corporation the duty of transporting property (not the mails, however) of the United States whenever required to do so, by any department thereof, without compensation; a duty to be actively performed.

It imposes, according to the construction of the appellant, no active duty whatever upon the petitioner corporation. The petitioner is not thereby required to transport, but simply to allow transportation; to furnish a way for use, — an iron way, it is true, but still, for the purpose of the present argument, like any other way.

Which of these two views is correct? The latter, the appellant maintains upon the following grounds.

FIRST: THE PHRASEOLOGY IN QUESTION AS UNDERSTOOD AT COMMON LAW.

Here are granted to the State of Kansas certain lands for the purpose of aiding the construction of the appellant's railroad; and, to this grant, this section annexes a condition by which is secured to the United States the perpetual use of this railroad. This section secures to the United States the use of something, — of a railroad; nothing less, nothing more.

Now, it is clear that the right here secured to the United States by statute might be secured in some other way. The use of a railroad is a thing which may be sold or let. It may be transferred by deed or by lease, as well as by statute enactment. It is a proper subject of a common law conveyance.

Suppose that this railroad, having been constructed as required by the conditions of this grant (which conditions, as will be more fully noticed hereafter, do not require equipment as a part of construction), had been leased for a term of years, or, to make the illustration more forcible, sold to the United States; had been conveyed, in fact, under the common law. Would not this have been a complete execution of the provisions of this third section?

Is there any way known to the law, by which the use of any thing can be transferred more completely, more perfectly, than by transferring the thing ~~itself~~, by making whoever is to have the use, the owner, the absolute master, of the thing itself? Whose legal right to command the use can be better than his who has the legal dominion, who owns the thing to be used?

At common law what would the United States acquire by taking such a conveyance, by becoming the absolute owner of a railroad? Clearly, nothing but a title to real estate, — a title to the roadbed and the rails and other superstructure which had become affixed to the real estate conveyed; nothing but what might be conveyed by metes and bounds. Here are the decisions which determine this point.

In Beardsley *v.* Ontario Bank, 31 Barb. Supreme Court Reports, 624, Allen, J., says, —

> "It is a mortgage of the railroad, real estate, chattels real, and franchises of the company."

> "By the railroad is intended the road-bed and track, with its superstructure, — all that enters into and forms part of a *completed* road. No more is conveyed under the terms, 'railroad, real estate, and chattels real,' than would have been conveyed under a description of the roadway and other lands of the company by metes and bounds, with the appurtenances, except as to the after acquired property, which was not, at the time of the mortgage, susceptible of a description by metes and bounds, or in any other way."

(*P.* 635.) "The looms are distinguishable from the cars and rolling-stock of the railroad in this, that they were permanently placed, although not strongly affixed; while the rolling-stock was incapable of permanence, or of being affixed or annexed in any one place, but was intended for locomotion. Its whole use is in its locomotive facilities. The term by which it is ordinarily designated, 'rolling-stock,' implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of a railroad, but not a part of the railroad itself. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and every thing is ready for the reception of the locomotives and cars; it is equipped when the rolling-stock and all other necessary appliances and facilities for business are finished and put upon it for use. The company can then commence the trade of carrying passengers, to which the cars are necessary and accessory. The road and its equipments are as distinct as the store of the merchant, and the stock of goods upon the shelves."

In Bement *vs.* Plattsburgh & Montreal R. R. Co., 47 Ib. 107, Sutherland, J., gives a similar opinion as appears in the following extract: —

"In my opinion, the engines and cars of a railroad are not so affixed to the road that they can be called fixtures thereof, without introducing a new principle into the law of fixtures. They cannot properly be said to be *fixed* to the track; they can be lifted off the track, and put on to it again, by simply overcoming the law of gravity, and without any injury to the track or rails; they are not stationary, and were not intended to be. Their use is in being moved rapidly from one end of the road to the other, and frequently on and over a succession of roads. We can take judicial knowledge of what everybody knows, that sometimes they *run* and *jump* off the track. We can take judicial knowledge of the facts that there are many railroads, some of them connecting with each other, and that the cars and engines of one road pass on to and over another; for there is a statute regulating such connections, and declaring the liability of one company as carriers of freight on the connecting road of another company. Certainly cars and engines are essential for operating a railroad; but so are farming tools and implements for working a farm. The railroad company probably intends that its rolling-stock, and the farmer that his farming implements, shall be used on the railroad and farm, until used up; but this intended permanent local use of the farmer does not make his ploughs and reaping and mowing machines fixtures."

"But we know that railroads are about as common now as turnpikes were formerly; that they are nearly all of the same gauge; and that railroad cars are bought and sold, and transferred from one railroad to another, like wagons or post coaches; and I do not see why cars and engines on a railroad are any more fixtures than post-coaches on a post-road."

In the case of the Minnesota Co. *v.* the St. Paul Co. (2 Wall. 609), where the contest was between parties claiming under different mortgages, each of these mortgages in express terms conveyed the rolling-stock; and thus, the question now under consideration could not directly arise. But both opinions (there being a dissenting opinion in that case) use expressions which imply that the rolling-stock, aside from the connection made by these mortgages, is not a part of the railroad.

Mr. Justice Miller, in giving the opinion of the Court, speaks of "the road and rolling-stock, which are the subject-matter of this controversy," as though they were two, and not one.

And Mr. Justice Nelson, in the dissenting opinion, says, —

"We agree that the rolling-stock upon this road, covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is in technical language a fixture to the road, *so far as in its nature and use* it can *be called a fixture*."

These decisions place beyond dispute the proposition that a mortgage or other deed of a railroad would not operate a transfer of the rolling-stock upon and belonging to such railroad, the cars and the locomotive engines.

But suppose this not to be beyond dispute. Admit that it is doubtful whether, in general, the rolling-stock of a railroad is a fixture to be carried by a deed of the road without express mention. Admit even that it is such a fixture, and that the foregoing statement of law is not true of the rolling-stock of such roads.

Still it needs no argument to maintain that this must be true of elements which are more distant from the idea of a mere road, than the rolling-stock, which rolling-stock in one sense may be said to belong to it. I refer especially to the subsequent perpetual furnishing of cars and locomotive power, — to the subsequent perpetual furnishing of service and of direction essential to the operation of a railroad. Not only would these not be carried by implication in a deed conveying the road or granting its use, but also they would not ordinarily be deemed proper subjects to be treated in a deed of conveyance. They would much more appropriately find a place in a special contract or agreement, other than a deed or lease. They would require an agreement to do certain acts not sounding of the realty, a contract to furnish cars, engines, the labor of men unskilled and highly skilled, and good brains active for direction; to furnish not once, but constantly, according to the wants of a machine that scarcely knows slumber or sleep.

It is very clear that a conveyance of a railroad or of its use would not impose the obligation to furnish all these elements, upon the grantor. Yet these elements are in contest in this case. The Government, in its defence, demands that the petitioner should furnish to its use all of these elements, — rolling-stock, locomotive power, active service, and intelligent management.

And it appears that, in demanding these, it demands more than a lease or a deed, conveying just what the statute under consideration gives it title to demand, would transfer to it. A common law instrument, couched in the very terms of the section which defines the right of the Government, would not support the present claim of the Government. At common law, the term " use of a railroad " does not imply what this defence attempts to infer from it.

Nor does the implication, which this defence attempts to raise, receive any aid from the words which, in this third section, are adjunctive to this phrase " use of a railroad."

The use secured by this third section is not exactly an unlimited use. The railroad is not to be for the use of the Government solely and simply. A phrase is used which makes meaning different from that. The railroad is to be a public highway for the use of the Government. The Government is to use it as a public highway is used, not otherwise.

Now, if there be one thing clear about the use of a public highway, it is that the right to use it does not carry the privilege of being furnished with a carriage in which to be drawn over it, with the locomotive power necessary to draw such carriage, or with the driver to conduct it on its course and to regulate its going and stopping.

A public highway is not furnished with, and is not expected to furnish, rolling-stock. It does not possess locomotive power for the passing over it. It has no corps of skilled operatives to aid the transportation along its line.

It furnishes simply a roadway. It allows liberty of passing, nothing more. Active transportation is not one of its undertakings.

If it be thus of the phrase "public highway," how is it with the other adjunctive word, the word "toll"? "Free from toll," says the section.

Is "toll" something which is paid for the use of locomotive power? Is it the price of transportation? Not at all, by sea or land. Bouvier defines it as something "paid for the use of a road, bridge, or the like, of a public nature;" Webster, as a tax paid "particularly for travelling over a road, bridge, &c." It is a word peculiarly connected with highways, bridges, and canals, over which one acquires the mere liberty of passing. In common speech it has no reference to the service of active transportation. With the furnishing of locomotive power, it has no association in our minds.

It is scarcely used in connection with the business of transportation. Proprietors of sailing-vessels and wagon-trains, steamboat and railroad companies, do not collect tolls for the transportation which they perform. Their earnings are in fares and freights, not in tolls.

In general, this statement I apprehend to be true alike in England and America; true, in fact, wherever the English language is the common speech. But in each country, at least in one instance, there appears a modification of it in a special particular. In England and America the word "toll" has had a use in connection with railroads, which has been judicially recognized. As thus recognized, its meaning does not refer in any way to what is paid for transportation; it does not at all trench upon the meaning of the words "fare" and "freight." It designates nothing which this defence would desire to have it designate. On the other hand, though differently defined in the two countries in some minor features, its essential meaning in each is what this petition alleges as its true meaning, — something paid for the mere liberty of passing.

In England toll is defined as "something paid by one railroad company for the liberty of passing its carriages over the road of another company."

Here is an extract from the decision in the case of Simpson *v.* Denison, 13 Eng. L. & Eq. 359 (A. D. 1852), p. 365:

> "The payment here agreed to be paid is not a toll within the meaning of the act of parliament. Tolls are defined to be 'dues receivable for the liberty of passing over highways, public or private.' They are payments connected with the passing over."
>
> "If I were compelled to give any opinion, it would be that tolls should be fixed with reference to the number of carriages passing over the railway, the payment being in consideration of their passing over, both under the act of parliament, and from the nature of tolls, being a payment made in reference to their passing over."

"The liberty of passing over" is the phrase of this decision. That is what toll is paid for. Five times in this short extract is this expression, "passing over," to be found. To that idea toll is related exclusively. It does not belong to transportation. Transportation is not mentioned nor implied in this its definition.

In this country the definition of the word "toll" is still closer to the meaning asserted by this appellant. The question for decision was whether the right of a railroad company to exact tolls, included and exhausted its right to exact payment for the service of active transportation: in substance, the very question now at bar. In the case now to be cited (Boyle *vs.* The Philadelphia & Reading R. R. Co., 54 Penn. State Reports, p. 310), the opinion given by the present Mr. Justice Strong of this bench denied to the word this comprehensive significance, holding that the word "toll," not relating to the service of transportation, was something to be paid for the mere use of the roadway, by others than its owners, passing over it in their own carriages, and with their own locomotive power. This appears in the following extract:—

> "That the proviso was not intended to limit the charges which the company might make in the conduct of their own business as transporters, is deducible, also, not only from the fact that it is a restriction upon the power previously given in unlimited terms to prescribe rules for others, an exception out of what without it would have been granted, but from the other fact that it *was toll*, and *not freight*, for which maximum rates were fixed. The legislature must be considered as having used words in the ordinary signification, and especially so when their technical sense and their ordinary signification are the same. The legal meaning of the word 'toll' is and always has been well defined. It is a tribute or custom paid for passage, not for carriage,—always something taken for a liberty or privilege, not for a service; and such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are any thing more than an excise demanded and paid for the privilege of using the way. As already said, the Phila. & Reading R. R. Co. was one of the earliest chartered in this State. Before 1833 transportation had been generally over common roads, turn-

pikes, and canals. The common and the legislative mind were then familiar with what was called tolls. They understood by them, sums paid for liberty of passage without more, and this whether due to a turnpike, a canal, or bridge company. Certainly it was never supposed that tolls were a compensation for the use of carriages, for motive power, for superintendence in transit, and for service rendered in transporting in addition to the liberty of using the way."

I may safely leave this citation without repetition or enlargement. I will merely ask the court to notice that the date of the enactment by the Pennsylvania legislature is the year 1833. Later I shall have occasion to notice an enactment by Congress in the same year.

The other adjunctive words, "or other charge," following the word "toll," are to be understood in the sense of "other like charge;" that is, like to toll.

For such construction the common law furnishes ample authority under its rule of interpretation known as *noscitur a sociis.* (See Broome's Legal Maxims, and these cases there cited. Borradaile *v.* Hunter, 5 M. and Gr., 639; Hunt *v.* Robins, 2 G. and D., 646; Hardy *v.* Singer, 5 Exch., 294: see 298). From the first of these cases, the following are extracts. (See p. 667.)

"The words of the proviso are: 'If the assured shall die by his own hands, or by the hands of justice, or in consequence of a duel;'" "and it appears to me, upon the acknowledged rule of construction, viz., *noscitur a sociis*, that 'by his own hands,' the first member of the same sentence, and the third excepted case, should, if left in doubt as to its meaning, be governed by the same conditions as the other two, and be taken to mean a felonious killing of himself; that is, self-murder."

But the construction to be given to these words "or other charge," in the statute now under consideration, does not depend so much upon any general rule of interpretation recognized by the common law, as it does upon the significance attached to these words in statutes of the United States *in pari materia* with the statute now at bar; and this use of these words will clearly appear, without special allusion to it, in the next portion of this argument, to which I now pass. For this brings me to the conclusion of that portion of my argument which rests upon inferences to be drawn from the common law. The common law, it has been seen, lends no aid to the support of this defence. As it knows and has used and still uses these expressions: "use of a railroad," "public highway," and "toll," neither of these, nor the adjunct "other charge," has a meaning which will support the claim of the Government. Neither suggests nor implies the idea of being furnished with carriages, with locomotive power, with organized active service, and with intelligent direction, such as are essential to the discharge of the functions of a transportation company. Each and all are satisfied, amply satisfied, with such use of a railroad as one railroad company may make of the road of another company; that is, with the liberty, the mere license, to pass with its own engines and cars over such road.

SECOND, AS USED IN THE STATUTES OF THE UNITED STATES.

In this second portion of my argument, I propose to consider how the phraseology now under consideration has been used in the statutes of the United States. My proposition is, that, in the legislation and administration of the United States, the language now in question has been used, interpreted, and applied in the same sense as at common law. From its first use until its last, it has never carried the idea of active transportation: it has always been confined to the mere liberty of passing over.

Here, before passing to the consideration of this main proposition, let me call the attention of the Court to a matter which incidentally throws a strong light upon this main proposition, and, indeed, upon the main issue before the Court.

It is this: The statutes of the United States understand what constitutes a completed railroad, as the decision of a New York court, which I have cited, ~~states it~~. That is, the statutes of the United States understand that a railroad is completed when the roadway is completed; they do not understand that the completion of a railroad involves its equipment and furniture.

This appears in the fact that when Congress demands, as a condition precedent to a grant of its aid to a railway enterprise, that the railway shall be not only built, but equipped, then it specifies its equipment; while, in its grant to aid the building of the road of this petitioner, it makes no such specification, as I noticed casually in my opening statement. Compare Act of July 1, 1862, Sect. 3, Stat. at Large, XII. 492, with Act of March 3, 1863, Sect. 4, Stat. at Large, XII. 772.

This is the substance of the former: —

> "That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, *equipments*, *furniture*, and all other appurtenances of a first-class railroad . . . then . . . patents shall issue conveying the right and title to said lands to said company."

And this of the latter: —

> "That . . . when any twenty consecutive miles of either of said roads or branches is completed in a good, substantial, and workmanlike manner as a first-class railroad . . . the said State may cause to be sold all the lands granted as aforesaid, situated opposite to and within a limit," &c.

The Pacific Railroad, it appears, is to be not only completed, but also to be supplied with equipment and furniture; while the whole requirement of the appellant's road is, that it shall be completed, — completed on the face of the earth, in sections of twenty miles. Plainly this last requirement exacts nothing but a roadway.

Now, is it not a natural, even a necessary inference, that what Congress required to be produced in each of these cases, that was what Congress intended that the Government should have to use in each case? Of the appellant the statute demanded only a roadway. Is not this all that the statute reserved to the United States the right to use?

Next, let me pass to the phraseology now in question. Let me glance at the statutes — even the earliest — in which it may be found.

The expression, "shall be and remain a public highway," is quite ancient in the legislation of the United States. It is to be found in a statute of 1796, concerning the territory northwest of the Ohio. There it is applied to "all navigable streams or rivers within the territory." (Stat. at L., I. 491.)

> "That all navigable streams or rivers within the territory to be disposed of, by virtue of this act, shall be deemed to be and remain public highways."

This is the provision, — the whole of it.

In 1824 the same expression is to be found in a grant of land made to the State of Indiana, to aid in the construction of a canal between the Rivers Wabash and Miami of Lake Erie. These are its terms: —

> "That the said canal, when completed, shall be and forever remain a public highway for the use of the Government of the United States, free from any toll or charge whatever for any property of the United States, or persons in their service, on public business passing through the same." (Stat. at L., IV. 47, ch. 65, sect. 2.)

In 1827 there was legislation approaching nearer to the issue involved in the present case. There was a grant of land to aid the Columbus and Sandusky Turnpike Company in making a road; and this was the condition of the grant: —

> "That no toll shall at any time be collected of any mail stage, nor of any troops or property of the United States." (March 3, 1827, Stat. at L., IV. 242, ch. 103.)

In 1834 there was further legislation in relation to an ordinary road or way. The United States surrendered a road already built, "the Mars Hill military road in the State of Maine," to that State; and this was the condition of the surrender: —

> "That no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States or any cannon or military stores belonging to the United States, or to any of the States comprising this Union." (June 30, 1834, Stat. at L., IV. 716, ch. 36.)

Twelve years later a grant was made to the Territory of Iowa, upon its admission to the Union, to aid in the improvement of the navigation of a river, — the Des Moines; and the right secured under that grant was this: —

> "That the said River Des Moines shall be and forever remain a public highway for the use of the Government of the United States, free from any toll or other charge for any property of the United States, or persons in their service, passing through or along the same." (Aug. 8, 1846, Stat. at L., IX. 78, ch. 103.)

On the same day Congress made another grant to another State not in being, for a like purpose with the last mentioned. It granted to the State of Wisconsin, upon its admission to the Union, land to aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal; and this is the proviso attached to its grant: —

> "The said rivers when improved, and the said canal when finished, shall be and forever remain a public highway for the use of the Government of the United States, free from any toll or other charge whatever for the transportation of the mails, or for any property of the United States, or persons in their service, passing upon or along the same." (Aug. 8, 1846, Stat. at L., IX. 83, ch. 70.)

In five of these instances there is a grant, involving, of course, a grantee. In some of them, a State appears to be not only the nominal grantee (as in case of railroad grants), but also to be contemplated as the actual ultimate beneficiary of the grant, and the performer of its conditions. But supposing this not to be the fact; that, on the other hand, in each of these instances, where a sovereign State is the grantee named in the act, the State was the mere channel to carry the granted lands to some private individual or corporation which was to perform its conditions.

Then, it is to be remarked that neither of these grants necessarily, or even naturally, contemplates as its ultimate grantee, a person or corporation engaged in the business of transportation.

These grants concern rivers, canals, and highways; and those who undertake the improvement of navigable rivers, those who make and own canals and highways, do not, as such, carry on the business of transportation. No one of these grants, then, implies in its condition the duty of active transportation. The condition of each is satisfied with mere allowance of transportation, with the mere liberty of passing, nothing more.

But some of these statutes would seem to contemplate a sovereign State as the ultimate grantee; and active transportation cannot have been intended to be imposed upon such a grantee. It cannot be that the State of Wisconsin was to transport the mails of the United States under the grant which was made to her.

But, where this expression first appears in the statutes of the United States, there is no grant, and of course no grantee. It is a naked enactment, a mere fiat of the sovereign will of the United States, that the vast rivers in the vast territory north-west of the River Ohio shall be and remain public highways. Here there is no one implied who is to furnish rafts, boats, or vessels for carriage, who is to load and unload cargoes, who is to conduct voyages. Locomotive power there is, indeed, as these currents slide downward toward the sea. But where is to be found, or who is to furnish, the propelling force in the opposite direction, against these currents? The statute does not imply any such furnishing; it contemplates the performance of no such obligation. It is contented with the mere liberty of passing. It enacts nothing more than the right of free navigation.

It was from these last two statutes (those of Aug. 8, 1846, making grants to Iowa and Wisconsin), that this phraseology passed into statutes of the United States which make grants of lands to aid in the construction of railroads. In this new use, this phraseology first appears in a statute of Sept. 20, 1850; that is, the act granting aid to the construction of the Illinois Central Railroad. Its form is the same as that now under consideration. (Stat. at L., IX. 467, ch. lxi., sect. 4.)

No grant originally made in aid of a railway enterprise have I been able to find of earlier date than this of Sept. 20, 1850.

But several years earlier a piece of legislation is found, which carries the phraseology in question, from a grant in aid of a canal, with the same significance which it there has, to a grant in aid of a railroad, in a manner more marked and conclusive than could be done by the use of the same phraseology in such original grant. On March 2, 1827, Congress granted "a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan;" the grant being made under a particular form of the general phraseology now in question, which the counsel for the government, in arguing this case in the court below, contended was more favorable to a claim like that of this petitioner, than the form of that phraseology now under consideration. This, because the condition concluded with these words: "free from any toll or other charge whatever, for any property of the United States, or persons in their service *passing through the same*."

"In order" (urged the brief in defence) "to successfully apply the alleged analogous acts granting lands to canals, to the act under consideration, the words 'passing over the roadbed of the same,' or similar ones, would have to be added."

Here, now, we have these words (which are not to be found in every grant to a canal on ordinary highway), "passing through the same," used with reference to a canal, where they cannot imply active transportation to be performed by the grantee, where they can reserve to the grantor only the liberty of passing. What use was subsequently made of them? What was the ultimate disposal of the grant which was made with these words as parts of its condition?

By a subsequent statute (March 2, 1833) it was amended so as to be in aid of a railway enterprise, without repeal or modification of these, as the other side maintains, decisive words, it being in the later enactment,

> "*Provided*, That, if a railroad is made in place of a canal, the State of Illinois shall be subject to the same duties and obligations, and the Government of the United States shall be entitled to and have the same privileges on said railroad, which they would have had through the canal, if it had been opened." (Stat. at L. IV. 234, 662, Ch. LI. LXXXVII.)

This, let me say, is the earliest grant of lands which I have been able to find, made by the United States for the purpose of aiding the construction of a railroad.

Here Congress inserted in the condition of its grant — in the same condition which is now under argument — these qualifying words: "passing on the same." And the counsel for the Government admits that these words confine the privilege reserved to the Government to a mere passive allowance, that they impose no active duty whatever upon its grantee: they are amply satisfied with merely the liberty of passing.

The admission is correct. The date of the enactment of itself sustains it. This grant was made in the same year (to which I alluded earlier) in which the Legislature of Pennsylvania incorporated the Philadelphia & Reading R. R. Co., the year 1833; and the court of Pennsylvania say, —

> "Before 1833 transportation had been generally over common roads, turnpikes, and canals. The common and the legislative mind were then familiar with what was called tolls."

"The road was to be a public highway, as truly such as is a canal or turnpike road, though it was placed under the care, management, and regulation of its owners."

"It was then travelling by others than the company which the legislature had in view when this section was enacted." (54 Penn. State R. 310.)

This, then, was the mind of the national legislature (equally at one with universal public opinion, as the legislature of any one of the States), when it first entered upon this policy of aiding railway enterprises; and the statutes of the United States show no change in this legislation, until after, — some years after, — the date of the grant under which this appellant has taken its lands, a very late change, to which I will, at the appropriate time, allude.

So Congress legislated in the very beginning; and so, from the time when this legislation was first to be carried into effect, the department, which was called to administer it, understood this legislation of Congress, as I will now proceed to show.

This policy, once adopted, was afterwards adhered to; and, in the course of the next dozen years after the above grant in aid of the Illinois road, several similar grants had been made by Congress.

Of course, as soon as any railroad, built by aid of a grant of lands from the United States under this condition, went into operation, there might arise occasion for the practical interpretation of its language; interpretation most likely in the first instance to come from an executive department of the United States. Such interpretation was, in fact, made. The case finds that it was made early; as early, at latest, as August, 1861. The defence has shown no other interpretation, earlier or even later. The memory of no officer of the United States, the remembrance of no act of the United States, appears to run to the contrary. This early established, unbroken interpretation is that now asserted by the appellant.

It had been adopted prior to March 3, 1863. Its adoption is even recognized as an actual fact in Congressional debates which occurred in January and February, 1862, upon a joint resolution hereafter to be more fully noticed. These debates, as it were, hinge upon it; and it was brought to the knowledge of the House definitely in this manner: The Secretary of War had directed what has sometimes been known as the St. Louis Commission to allow, in accordance with this interpretation, a claim of the Illinois Central Railroad Company; and the letter of the present Mr. Justice Davis of this bench, stating this fact, was read in the course of this debate.

There was, then, at the time of the passage of the act under which the appellant holds its lands granted by the United States, a well-established construction, upon the part of the Executive Department, of the phraseology now in question. In re-enacting that phraseology, Congress adopted this previously established well-known construction: —

> "If a provision in one statute receives a judicial construction, and it is inserted in another, the same construction would be given to it." (Rutland *v.* Mendon, 1 Pick. 153: see 156.)
>
> "It is a common learning that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act which has been passed by the legislature of one State or country is afterwards passed by the legislature of another. So when the same legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For, if it were intended to exclude *any known construction* of a previous statute, the legal presumption is, that its terms would be so changed as to effect that intention." (Commonwealth *v.* Hartnett, 3 Gray, 450: see 451.)

It is true that in the above cases the courts are actually considering the effect of judicial constructions, and to such construction their language is chiefly confined. But the reason of the rule which they sanction is not thus confined; and its wider extent is recognized in the later of these two decisions, as reaching to "any known construction."

No other construction, perhaps, could carry so nearly the weight of judicial construction as that of the executive departments of the United States. The scope of these departments is large, involving almost constantly the determination of questions of law. Professional advice of a high character is at their service; and their deliberate interpretation of a provision of law, which they are required to administer, must receive the respectful attention of even this high tribunal. This is the view taken by the Court itself in a case recently decided.

In the case of Peabody *v.* Stark (16 Wallace, 240) the opinion of the Court was to this effect:—

> (P. 243.) "In the absence of a clear conviction, on the part of the members of the court, on either side of the proposition, in which all can freely unite, we incline to adopt the uniform ruling of the office of the internal revenue commissioner."
>
> "It is made to appear to us in a very satisfactory manner, that such has been the unvarying rule of that office since the act went into effect; and, while we do not hold such ruling as in general obligatory upon us, we are content to adopt it in this case, for the reason already mentioned, as well as for its obvious fairness."

In Clark *et al.* *v.* Peaslee, 1 Clifford, 545, the same doctrine is found thus concisely and aptly stated:—

> "Where the interpretation of the revenue laws and regulations is involved, considerable weight should be given to the practice of the Government as a contemporaneous construction of the provision under consideration." (P. 563.)

But at this time the attention of Congress had been specially called to this subject, in this way. Two railroads in Missouri, constructed by the aid of lands granted by the United States under the condition now in question, had suffered so much from the ravages of war which swept back and forth across the line of their roads, that they were compelled to apply to Congress for aid. Their case is substantially set forth in the joint resolution which gave them relief (March 6, 1862, No. 15, Stat. at L. XII. 614).

They are there described as what are known as land-grant railroads, the condition of the grant being repeated; and thereafter the preamble goes on with this further recital: —

> "Whereas the ability of said railroad companies to transport the property and troops of the United States over their respective railroads has been greatly impaired."

Now, ability on the part of these railroads to do what had been thus impaired? Let it be noticed that this impaired ability was wholly pecuniary. The debate shows that the injuries done by the enemy to these roads had already been repaired; and the disability of the companies was a disability to procure the money needed to pay for these repairs, and to pay the current expenses of the roads.

Had these roads become thus pecuniarily disabled in the attempt to transport property and troops of the United States without cost to the United States? Not at all. No land-grant railroad company, down to that time, had ever been asked to do that, — to transport for the United States entirely at the company's cost and charge. It was not inability to do that, which these companies presented to the attention of Congress. It was inability to transport at two-thirds of the regular rate, inability to endure a deduction of one-third from their established fares and freight.

The joint resolution, having thus recited, then proceeds to authorize (temporarily of course) the payment to these companies for such transportation in full.

To this enactment ~~it~~ adds two provisos, evidently intending that this should be a most careful piece of legislation; each proviso covering a right of the United States, — a right the definition of which is involved in this case, and upon the definition of which this case turns.

The first proviso is to the effect that payment made to these companies as just before directed "shall preclude any further claim on behalf of such companies against the Government FOR COMPENSATION, or damages previously accrued, or for the military occupation," &c.

Is not this something like a recognition by Congress, that, without this payment, these companies might have some claim for compensation? Is it probable, possible even, that such language would have been used with reference to a railroad company which was bound by solemn contract to transport the property and troops of the United States whenever required, absolutely without compensation?

The other proviso touches a different part of this subject. It intends to reserve unmodified the ultimate right of the United States over this railroad; and in reserving that right it defines it. Here is the definition: —

> "And provided further" that "nothing herein shall be so construed as to prevent the Secretary of War from taking possession of said railroads and their appurtenances, and applying the same to the exclusive use of the Government, whenever, in his judgment, the public interests may require it, without, in such case, compensation to said companies" (p. 615).

The right there so carefully reserved is the right merely to operate the road itself, to furnish and run the trains at its own expense; not to run them, and compel the owner to pay or contribute to the expense. The taking here referred to is a taking which brings with it every current duty of ownership: the taker must in every particular supply and maintain the road in its realty, in its movable stock, and in its living service, in repair and use. It can throw this burden upon no one else.

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Congress in this proviso, adopted to assert the ultimate right of the United States, claims nothing more than the use of the railroad, as the common law understands that phrase, as the petitioner here asserts its meaning.

Within a year from the passage of this joint resolution, the national legislature passed the statute under which this petitioner received its grant of lands. In that statute, it repeated this same phraseology. Can there be any doubt of the meaning intended to be conveyed by it? What notice had the grantee of any intent therein contained, other than that which had already been for years sanctioned by the Executive Department of the United States, and also here recently re-enacted by Congress? The State of Kansas took this grant with fair notice that such was its intent, and has the right now to insist upon it as the actual purport and effect of its contract.

Nor is this the only token of the mind of Congress upon this matter, to be found prior, and yet near, to the passage of the grant which is now before this court.

On July 1, 1862, that body did give aid to railroad companies on condition that they should, when their roads were constructed, perform transportation for the United States; that is, to the great Pacific Railroads which were to cross the continent.

Here Congress did not use the phraseology now under consideration, but other and entirely different in its force. Here it is: —

> "That the grants aforesaid are made upon condition that said company . . . shall keep said railroad . . . line in repair and use, and shall at all times . . . transport mails, troops, and munitions of wars, supplies, and public stores, upon said railroad, for the Government, whenever required to do so by any department thereof." (Stat. at L. XII. 493, Ch. CXX. Sect. 6.)

Here Congress meant to secure transportation; and accordingly its words were "shall transport," not merely "be and remain a public highway." Words of action, not of mere passivity and permanence, were used.

In the section which I earlier cited from this last-named statute, — that which defined the condition precedent of the land-grant to aid the Pacific Railroads,—it was specified that the road in its successive sections should be completed, "ready for the service contemplated by this act."

It is this last-cited section that brings out the full force of these words. The service thus contemplated was the active transportation plainly specified in this sixth section. Thus becomes clear the reason why Congress required that
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What was this purpose? Payment to these railroad companies for such transportation was to work what relief to the Government? Was it *pro tanto* to lead to a surrender to the United States of the lands which the United States had granted in aid of the construction of these roads? This should have been the disposition of the money thus paid, if the consideration for the grant of those lands had been transportation to be performed for the Government. In that case, every payment by the United States for such transportation should have caused a reversion, a reconveyance, of a proportionate part of such lands to the original grantor; and the Government should not have become liable to pay absolutely for such transportation, until all the granted lands had thus returned to its ownership.

But, under the statute of aid to those enterprises, no such appropriation is to be made of the payment in question. It is not to affect the granted lands at all. The payments are not to be carried to the land account.

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They are to go in payment of the bonds which the United States issued to aid the construction of these roads. Whatever money the Government pays to these roads, for transportation performed by them, is to go in reduction of the liability of the Government, as obligor in its subsidy bonds. It is to this bond account, that the transportation money is to be carried; that is, so long as there are any such bonds left outstanding.

When all these bonds are paid, let it be noticed, these companies, under the statutes which connect the United States with their construction, will be entitled to receive pay for government transportation, as for transportation performed for private individuals.

In this case, then, it is apparent that the land-grant was not made in consideration of transportation to be performed by the grantees for the Government, without compensation, wholly or even in part. It was made upon broader grounds, to secure the building of the roads.

Beside this interpretation given by Congress to similar phraseology to that which is used in the act of March 3, 1863, which I have just noticed, there is a like interpretation given subsequently to the very phraseology as occurring in this act itself.

On July 1, 1864, Congress made a grant of lands to aid in the construction of a certain railroad connecting with the road of this appellant, "subject to all the provisions, restrictions, limitations, and conditions, in regard to selection of lands and otherwise, of an act of Congress approved March 3, 1863, entitled 'An act for a grant of lands to the State of Kansas in alternate sections, to aid in the construction of certain railroads and telegraphs in said State;'" and then added, as though the addition were necessary, —

> "Provided, that said railroad shall be a public highway, and shall transport troops and munitions of war of the United States, free of charge."

In the same act, however, it renewed, as it were, a portion of the former grant, without altering its conditions. See Stat. at L., XIII. 339, 340, Ch. CXCVIII.

But it is not necessary to search beyond the statute now under consideration, for evidence that, where Congress desires to secure the privilege of transportation upon any specified terms, there it finds for the expression of that intention apt language different from the phraseology under consideration. The fifth section of the Act of March 3, 1863, before the court, affords an instance. It provides, —

> "That the United States mail shall be transported over said roads and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct." (XII., 774.)

Here, again, the words are "shall be transported." These words, let me say, are common to the statutes which make land-grants, like the grant now under consideration, in aid of railroads. On the other hand, they are not to be found in grants made in aid of ordinary highways. In grants of this latter class, where the mails are mentioned, the provision is not, they "shall be transported;" but the mails are classed with property and troops of the United States in the phraseology like that at bar. (See extracts from statutes, *ante*, p. 16, and p. 17: Columbus and Sandusky Turnpike, and Fox and Wisconsin Rivers.)

The matter stands, then, in this way. As to the mails of the United States, one provision of law is made in reference to ordinary highways, and another and different provision is made in reference to railroads. As to property and troops of the United States, one and the same provision is made with reference to other highways and to railroads, — one and the same provision with reference to both. If, now, the intent of Congress was that property and troops of the United States were to have a privilege from railroad companies, different from that which they enjoyed over ordinary highways, why was not this difference manifested by a difference of language, — such a difference as appears in reference to the mails?

Later the construction given by the War Department to this phraseology, as it occurred in these grants of lands in aid of railroads, was more formally communicated by the quartermaster-general to a committee of Congress. See letter of Feb. 14, 1865, with the brief in this case.

On the 3d of March following, Congress enlarged a former grant of lands to the State of Minnesota, upon precisely its former conditions, the same as those now at bar. On the same day it extended the time of limitation of a like grant to Michigan, without altering this condition. It did this in other cases, thus re-enacting this phraseology with knowledge of the construction which had been given to it, and thus, under authorities previously herein cited, adopting that construction.

For these instances see Stat. at L., XIII. 521, Chap. CIII. Sect. 1; 527, Chap. CV. Sect. 5; 530, Chap. CVIII. Sect. 1; XVI. 46, Chap. XXIV. Sect. 1; 580, Chap. CXXIII. Sect. 1; 582, Chap. CXXVIII. Sect. 1; 587, Chap. CXL.

But for the most part, in making new grants, it adopted new language. For instance, it added to the phraseology which has been under discussion, the following: —

> "And the same shall be transported over said road at the cost, charge, and expense of the corporation or company owning or operating the same, when required by the United States so to do."

July 13, 1866, Stat. at L., XIV. 95, Chap. CLXXXII. Sect. 4.
" 25, " " " 241, Chap. CCXLII. Sect. 5.
" 28, " " " 338, Chap. CCC. Sect. 1.

Or it used the following as the full condition of the grant: —

> "That said company after the construction of the road shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores, upon its road, for the Government of the United States, free from all cost or charge therefor to the Government."

July 25, 1866, Stat. at L., XIV. 237, Chap. CCXLI. Sect. 3.
" 26, " " " " 290, Chap. CCLXX. Sect. 3.
March 2, 1867, " " " 549, Chap. CLXXXVIII. Sect. 8.

This language is well worthy of attention. It plainly creates, and imposes upon the beneficiary of the grant made by the statute of which it forms a part, the duty here in dispute, — the service of active transportation.

But not merely for this direct effect of this condition, does it merit attention, but also for an incidental result which comes from it. Here is a contract, or what for the purpose of this argument we may regard as a contract, which might be the basis of a suit for damages in a court of law, or might be specifically enforced in a court of equity.

What is more to the point now under discussion, this contract could not be enforced in the manner in which Congress in its joint resolution of 1862 contemplated enforcing against the Missouri railroads its right under the earlier form of its land-grants, — the same and only right which it has against the petitioner. This right — this later right — cannot be enforced by taking possession of the railroad: to proceed in that way is to give up the right.

Here, then, is a broad distinction between the right conceded by this petitioner, and the right asserted by the Government; between the right merely to use a railroad, and the right to be furnished with transportation over such road. The one can be enforced, and Congress expressly saves its right so to enforce it by the United States taking possession of the road. The other cannot so be enforced; must be enforced, if at all, by legal proceedings.

Here if I have succeeded in keeping the attention of the court, as I have endeavored to trace the history of the legislation upon this matter, the court are likely to ask me this question: What in these later years has become of the phraseology which expressed the condition subsequent of the earlier grants of lands to aid in the construction of railroads, — phraseology such as that now at bar for interpretation?

True, it has of late years been dropped from the contents of grants to railroads; but it has not been dropped from the statute-books. It is still in use in by Congress as a condition of grants for the construction of military wagon-roads, — common highways, so to speak (Feb. 25, 1867, Stat. at L., XIV. 409, Ch. LXXVII. Sect. 2; March 3, 1869, Stat. at L., XV. 341, Ch. CL. Sect. 2).

That is, where Congress intends to exact the service of active transportation, it uses other language, and does not use this. It uses this where it desires simply the liberty of passing, where it does not intend to exact that which the Government in this case demand of this petitioner, — the active performance of the service of transportation.

Let me now, in concluding this portion of my argument, re-enforce the considerations which I have heretofore urged upon the attention of the court, by reading a very few words from the very short opinion with which the court of last resort in Pennsylvania finally disposed of the case which I have already cited. The case was nearly identical in principle, with this now before the court. The enactment to be construed, —

> "Provided, that the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile."
>
> "This case presents," said the court, "the single question whether the Philadelphia & Reading Railroad Co. have a right under their charter to charge, receive, or collect for the transportation of property carried by them over their road more than four cents per ton per mile, and more than two cents per mile for conveying each passenger."

The decisions were in favor of the right claimed by the Railroad Company; and, when the court had become thoroughly familiar with the merits of the question, they used little more than these words in the final opinion which led to the dismissal of the bill; the court as before speaking by the mouth of one of the present justices of this tribunal: —

. . . "In searching for the powers of the defendants as owners of the artificial road, we should be strangely employed were we to inquire what authority was given to them as carriers. And, on the other hand, the extent of their right as transporters is not to be measured by the provisions made respecting their ownership of the road." (54 Penn. State, 318.)

For the word "authority" here used, substitute "obligation;" for the word "right" substitute "duty" (and these substitutions are in logic allowable); and this extract applies to the case at bar, as the appellant maintains, in its full force.

THIRD: THE RULE MAINTAINED BY THE APPELLANT IS JUST AND EQUITABLE IN ITS OPERATION.

In the case of Peabody *vs.* Stark, before cited (16 Wall. 240), this court was influenced towards the adoption of a rule previously allowed and followed by an executive department, by the fairness of the rule itself.

It cannot then be inappropriate to notice the character of the rule, which the appellant in this case would maintain, in this regard. Is it a fair rule, as between the government and the land-grant railroads?

The former, the government of the United States, is in two ways interested in this matter.

1. As a great landed proprietor; as owning lands through which the proposed railroads are to run.

And it appeared, as early as 1862, that in this capacity the government had received full compensation for its grants in aid of such roads. The Judiciary Committee of the House of Representatives then reported that the price of lands remaining in the ownership of the United States (that is, an equal moiety of the original whole), along the line of such roads, had already doubled. Cong. Globe, Part I. 2d Sept. 37th Cong. 1861–2, p. 605.

"In every instance," is the statement, "where railroads have been constructed under these land-grants, the price of the public lands in their neighborhood has been suddenly enhanced to at least twice their former value. The Government, therefore, has lost nothing by its munificence."

2d. As a sovereign; and here in two respects.

In the increase of the population of the United States, as tending to the greatness and happiness of the nation. Such increase as consequent upon the building of railroads is witnessed by the sudden enhancement of the price of public lands, just mentioned.

In the importance of means of swift transportation to all the operations of the government in the far West, and also to the operations of war. It is much to reduce the time of passage from Chicago to San Francisco to six days, and to shorten all intermediate distances in the same ratio.

Beside these considerations, there is not to be overlooked the great saving of expense by the substitution of railway transportation in place of those modes used in the absence of railways: a reduction nearly from four to one, which a further deduction of one-third makes a total reduction from six to one, a saving of five-sixths.

And (a fact showing the effect of this rule upon the other party, the railroad companies) these railroads could not have been built without the aid, and very liberal aid too, from the government.

The statutes of the United States support this assertion. They exhibit not a few instances of the extension of the time within which grants of lands in aid of proposed railroads could be made effectual by the building of such railroads.

Capital, it may safely be inferred, was not eager for investment in such enterprises. This, of the earlier time near that of these grants, the contemporaneous condition, which must be considered in their interpretation.

The present time ought to appear more favorable to such enterprises; but even now, the building and operating of even land-grant railroads is not universally, or even generally, a profitable investment of capital.

Ultimately, it is true, some of these undertakings may be very remunerative; but capitalists in this country are not willing to wait long for returns.

Without the allowance to these railroad companies of a compensation of two-thirds their regular price, for transportation performed for the government, these roads could not have been operated by their owners during the late war. See the letter of the Q. M. G., printed herewith. And that officer feared, as the greater evil than the paying of this rate of compensation, the abandonment of these roads to the government itself.

Says that officer: —

> "I need hardly add that it is not for the interest of the United States to supply its own rolling-stock to do its work upon these land-grant railroads, and that it is much more economical to hire the engines, cars, and well-drilled operatives of the company, by paying for the service a certain fixed rate for each man or ton transported by the company."
>
> "As regards the policy of requiring the roads to do this work without any compensation, it is not perhaps proper to make suggestions. I hope, however, that Congress will not legislate in such a manner as to compel any of these railroads to abandon their roads, and throw them into the hands of the Government.
>
> "This Department finds the management of the railroads within recovered rebel territory, which it is obliged to take possession of, and to repair and stock, a very heavy though unavoidable burden."

Allusion has already been made to the fact, that in the case of the great Pacific roads, the government made its grant of lands without stipulating for any privilege of gratuitous transportation in whole or in part, upon no condition, save that the road should be well built and well operated.

This liberality, by the same Congress which granted the lands now held by this appellant, must have been deemed by that body necessary to secure the building of those great roads; and their building must have been considered as well worth to the government what the government bestowed upon their construction; not lands only, but credits, credits that could be turned into money; a munificent donation of lands and bonds of the United States.

Here this argument closes, having maintained these propositions: —

First, The language of the instrument which binds the petitioner, that is, of the third section of the act of March 3, 1863, AS UNDERSTOOD AT COMMON LAW, does not support the logic of this defence. It upholds the claim of the petitioner.

Second, ONLY IN THIS SENSE has it ever been used in the statutes of the United States. Congress so used it at the first. The Executive Department so interpreted and administered it. Congress subsequently sanctioned and confirmed this interpretation. This interpretation was fixed and established when the grant of the lands now held by the petitioner was made, and thus became a part of the grant. The subsequent legislation of Congress has re-confirmed this interpretation.

Third, As between the parties concerned, the rule contended for by the appellant is essentially fair and just. Its adoption leads to the accomplishment of the purposes which the government sought to accomplish by the legislation in question, and is necessary thereto. It secures to the railroad companies nothing which circumstances do not make it just and equitable for them to demand.

All which is most respectfully submitted for the consideration of the Court.

THOMAS H. TALBOT,

Of Counsel for the Appellant.